

In re Taylor, 1990 WL 424983 (Bankr.S.D.Ga., Sep 21, 1990) (NO. 89-11583, 90-1036)

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:

ODESSA H. TAYLOR

Debtor

ODESSA H. TAYLOR

Plaintiff

VS.

UNITED STATES OF AMERICA

Defendant

Chapter 13 Case  
Number 89-11583

FILED  
at 5 O'clock & 22 min. P.M.  
Date: 9-21-90

Adversary Proceeding  
Number 90-1036

**ORDER**

The United States of America ("USA") by motion seeks dismissal of this adversary proceeding contending that the USA's assertion of sovereign immunity deprives this court of subject matter jurisdiction. From the responsive pleadings filed by the USA, the facts necessary to resolve the motion are not in dispute. The debtor filed this Chapter 13 proceeding on October 13, 1989. The USA through its agency, the Internal Revenue Service ("IRS"), was a listed creditor of the debtor in the underlying Chapter 13 case and received notice of the Chapter 13 filing. Subsequent to the date of filing the USA through the IRS withheld the debtor's 1989 federal income tax refund and made a setoff against the

debtor's 1988 prepetition tax liability. By this adversary proceeding, the debtor alleges that the USA is guilty of civil contempt for violating the automatic stay of 11 U.S.C. §362(a). The debtor prays for injunctive relief ordering the USA to cease and desist any further stay violations and ordering a refund of the withheld 1989 tax refund. The debtor further seeks compensatory and punitive damages, plus attorney's fees and costs pursuant to 11 U.S.C. §362(h). The USA has not filed a proof of claim in the underlying Chapter 13 case.

Under the Eleventh Amendment to the Constitution of the United States of America<sup>1</sup> and the doctrine of sovereign immunity "[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Mitchell, 445 U.S. 553, 538, 100 S.Ct. 1349, 1351, 63 L.E.2d 607, 613 (1980) [quoting United States v. Sherwood, 312 U.S. 584, 586, 61 S.Ct. 767, 769-770, 85 L.E. 1058, 1061 (1941)]. A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." Mitchell supra 445 U.S. at 538, 100 S.Ct. at 1351, 63 L.E.2d at 613 [quoting United States v. King,

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<sup>1</sup>U.S. Const. Amend. XI:

The Judicial power of the United States shall not be construed extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

395 U.S. 1, 4, 89 S.Ct. 1501, 1503, 23 L.E.2d 52, 56 (1969)]. "Waivers of immunity must be 'construed strictly in favor of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'" Ruckelshause v. Sierra Club, 463 U.S. 680, 685~86, 103 S.Ct. 3274 3278, 77 L.E.2d 938, 944 (1983) [quoting McMahon v. United States, 342 U.S. 25, 27, 72 S.Ct. 17, 18, 96 L.E. 268 (1951); Eastern Transportation Co. v. United States 272 U.S. 675, 686, 47 S.Ct. 289, 291, 71 L.E. 472, 475 (1927)]. Strictly construed, the plain language of 11 U.S.C. §106(a)<sup>2</sup> provides the unequivocal waiver of sovereign immunity applicable in this case. Bankruptcy Code §106(a) provides for

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<sup>2</sup>11 U.S.C. 106 provides:

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity

(1) a provision of this title [11 USCS 101 et seq.] that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

the waiver of sovereign immunity where

1. the claim against the governmental unit is property of the estate;

2. the governmental unit has a claim; and 3. the claim against the governmental unit arises out of the same transaction or occurrence as the governmental unit's claim.

This adversary proceeding seeks a determination of a civil contempt for violation of the automatic stay under 11 U.S.C. §362(a)<sup>3</sup> and the award of appropriate damages pursuant to 11 U.S.C. §362(h)<sup>4</sup>. The

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<sup>3</sup>11 U.S.C. 362(a) provides in pertinent part:

(a) Except as provided by subsection (b) of this section, a petition filed . . . , operates as a stay, applicable to all entities of . . .

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; . . .

(6) any act to collect, assess, or recover a claim against debtor that arose before the commencement of the case under this title [11 USC 101 et seq.];

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title [11 USC 101 et seq.] against any claim against the debtor; . . .

<sup>4</sup>11 U.S.C. §362(h) provides:

complaint asserts a claim against the USA, a governmental unit. A claim for damages under 11 U.S.C. §362(h) by a Chapter Attorney General of the U.S., Dept. of Justice, Washington, DC 205303 debtor is property of the estate. 11 U.S.C. §541<sup>5</sup>; §1306(a)(1)<sup>6</sup>; United States v. McPeck, 910 F.2d 509 (8th Cir., August 6, 1990).

As to the requirement that the governmental unit have a claim, as of the date of filing of the underlying Chapter 13 case the USA had a claim for 1988 tax liability as "claim" is defined

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An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys fees, and, in appropriate circumstances, may recover punitive damages.

<sup>5</sup>11 U.S.C. 541 provides in pertinent part:

(a) The commencement of a case under Section 301 . . . of this title [11] creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interest of the debtor in property as of the commencement of the case.

<sup>6</sup>11 U.S.C. 1306(a) provides:

(a) Property of the estate includes in addition to the property specified in section 541 of this title

(1) All property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under Chapter 7, 11 or 12 of this title [11], whichever occurs first; . . .

under the Bankruptcy Code and used in §106(a). A "claim" means a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. 11

U.S.C. §101(4)(A). "The express language of §106(a) says nothing about the necessity of the government unit filing a proof of claim in order to trigger the waiver of sovereign immunity. By the clear terms of the statute, the waiver is triggered by the existence of the government's 'claim', not the filing of the proof of claim". Town & Country Home Nursing Services, Inc. v. Blue Cross of California, et al. (In re: Town & Country Home Nursing Services, Inc.) 112 B.R. 329, 333 (9th Cir. BAP March 30, 1990). See also In re: Inslaw, 76 B.R. 224, 229-30 (Bankr. D.D.C. 1987), In re: Adirondack Ry. Corp. 28 B.R. 251, 256 (Bankr. N.D.N.Y. 1983); In re: Davis, 20 B.R. 519, 520-21 (Bankr. M.D. Ga. 1982).

The remaining criteria for §106(a) waiver of sovereign immunity requires a determination that the claim against the governmental unit arose out of the same transaction or occurrence; as the governmental unit's claim. A determination of "same transaction or occurrence" requires the same analysis as whether the claim would be compulsory counterclaim under Federal Rule of Civil Procedure 13 ("Rule 13")<sup>7</sup>. 2 Collier on Bankruptcy

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<sup>7</sup>Federal Rule of Civil Procedure 13(a) provides:  
(a) Compulsory Counterclaims. A pleading shall state as a counterclaim

¶106.02

(L. King 15th ed. 1989); In re: Lile, 96 B.R. 81 (Bankr. S.D. Tex. 1989); In re: Davis supra. Rule 13 defines a compulsory counterclaim as a claim that "arises out of the transaction or occurrence that is the subject matter of the opposing~party's claim." Binding precedent requires that this court employ the "logical relationship test" in establishing whether or not the claims are sufficiently related to amount to compulsory counterclaims. United States v. Aronson, 617 F.2d 119 (5th Cir. 1980)<sup>8</sup>; Plant v. Blazer Financial Services Inc. of Georgia 598 F.2d 1357 (5th Cir. 1979); Revere Copper & Brass, Inc. v. Aetna Casualty Surety Co. 426 F.2d 709, (5th Cir. 1970). Under this test, a logical relationship exists when "the same operative facts serves as the basis for both claims or the

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any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon the claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgement on that claim, and the pleader is not stating any counterclaim under this Rule 13.

<sup>8</sup>Decisions of the Court of Appeals for the Fifth Circuit decided prior to September 30, 1981 are binding precedent in the Eleventh Circuit. See, Bonner v. Prichard 661 F.2d 1206 (11th Cir. 1981).

aggregate core of facts upon which the claim rests activates additional legal rights, otherwise dormant, in the defendant." United States v. Aronson supra at 121 (quoting Plant v. Blazer Financial Services, Inc. of Georgia at 1361.) The following quote is directly on point as to the facts of this case and best articulates the basic approach under the "logical relationship" test which requires a determination

whether the essential facts of the various claims are so logically connected that considerations of judicial economy and fairness dictate that all issues should be resolved in one lawsuit. [Pochiro v. Prudential Ins. Co. of Am. 827 F.2d 1246 (9th Cir. 1987)] A logical relationship exists when the counterclaim arises from the same aggregate set of operative facts as the initial claim, in that the same operative facts serves as the basis of both claims or the aggregate core of facts upon which the claim rests activates additional legal rights otherwise dormant in the defendant. [In re: Lile supra at 85 (quoting U.S. v. Aronson supra; Plant v. Blazer Financial Services, Inc. of Georgia supra)]. Further, the same transaction or occurrence should be liberally interpreted under Fed. R. Civ. P. 13(a). In re: Lile supra at 85.

In this case, the IRS claim against the debtor arises from the debtor's failure to pay taxes owed. The debtor's claim arises pursuant to the attempt by the IRS to collect these taxes owed by the debtor. The basis of both cases revolve around the aggregate core of facts regarding the debtor's unpaid taxes. Therefore, . . . under these circumstances the essential facts relating to the tax claim itself are logically related to the government's collection activities.

United States v. Bulson (In re: Bulson) 117 B.R. 537, (WL 119377) (9th Cir. BAP August 17, 1990).

Under the undisputed facts of this case the clear and



unequivocal waiver of sovereign immunity of 11 U.S.C. 106(a) applies to the USA<sup>9</sup>. It is therefore ORDERED that the motion to dismiss based upon a claim of sovereign immunity by the United States of America is ORDERED denied.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 21st day of September, 1990.

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<sup>9</sup>The remaining provisions of 106 do not apply in this case. Bankruptcy Code §106(b) provides for "offset against an allowed claim . . . of a governmental unit of any claim against such governmental unit that is property of the estate." Determination of the meaning of "allowed claim" is made by reference to 11 U.S.C. §502(a), "[a] claim . . . proof of which is filed . . . is deemed allowed . . . ." In order for a claim to be allowed, a proof of claim must be filed. As no proof of claim has been filed, no governmental unit's claim is allowed in order for §106(b) waiver of sovereign immunity to apply. Bankruptcy Code §106(c) does not apply in that the debtor seeks a judgment for damages against the USA. Section 106(c) does not authorize monetary recovery from the USA. Hoffman v. Connecticut Dept. of Income Maintenance et al. U.S. , 109 S.Ct. 2818, \_\_\_\_ L.Ed.2d \_\_\_\_ (1989).